Once the defendant meets its burden of production, the presumption created by the *prima facie* case "drops out of the picture", and the burden shifts back to plaintiff to prove by a preponderance of the evidence that DAK's asserted reasons for the challenged employment actions were pretextual, that is, not the true reasons for the employment decisions, and that the true reason was intentional discrimination by the employer on the basis of Plaintiff's race and retaliation. *St. Mary's*, 509 U.S. at 510-11, 515-17; *Hill*, 354 F.3d at 285. At this point, the burden to demonstrate pretext "merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089 (1974).

DISCUSSION

A review of the record and relevant case law reveals that the defendant's motion should be granted.

For purposes of its summary judgment motion, DAK assumes that plaintiff can establish the elements of his *prima facie* case of discrimination, thus shifting the burden of production to DAK to articulate a legitimate, nondiscriminatory reason for each of the adverse employment decisions about which plaintiff complains. The defendant's argument is that the plaintiff has only his own conclusory belief that DAK's proffered reasons for its action are just pretext for the real reason, illegal discrimination. Therefore, the defendant is entitled to judgment as a matter of law.

a. 2001 Performance Evaluation

When DAK implemented a new performance evaluation system in the spring of 2002, all DAK employees, including plaintiff, were informed that since it was a new system, the results of the first performance evaluations would have no bearing on employees' variable compensation for the prior year. Rather, the evaluations would be used as a benchmark for how performance would be judged by DAK in the future. Plaintiff's 2001 Performance Evaluation indicated that he needed to improve his work performance in four (4) out of eight (8) categories, and he received an overall evaluation of "below expectations." Plaintiff disagreed with this evaluation and pursued an internal grievance alleging retaliation. DAK investigated and concluded that plaintiff's 2001 Performance Evaluation was based solely on his performance, and there was no validity to his retaliation allegations. White employees who never filed charges of discrimination also received an overall rating of "below expectations" in their 2001 performance evaluations.

Plaintiff claims his 2001 Performance Evaluation[3] was motivated by race and retaliation discrimination because: (1) he believes his performance was good; and (2) his attendance rating within the evaluation was lower than two white employees who Plaintiff alleges had more absences than he did. (Minus Dep. at pp. 57, 51). However, the case law makes clear that a plaintiff's unsubstantiated beliefs about his performance are

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[3] It also appears that the plaintiff did not suffer an actionable adverse employment action since the review did not result in an adverse effect on the terms, conditions, or benefits of his employment. See, e.g., *Von Gunten v. Maryland*, 243 F.3d 858, 865-68 (4th Cir. 2001).

insufficient to establish discrimination. *See, Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996) (finding that the plaintiff's unsubstantiated allegations and bald assertions concerning her own qualifications and the shortcoming of her co-workers failed to disprove the employer's explanation for its decision or to show discrimination); *see also, Goldberg v. B. Green & Co.*, 836 F.2d 845, 848 (4th Cir. 1988) (noting that plaintiffs "own naked opinion, without more, is not enough to establish discrimination"). Moreover, although plaintiff may disagree with DAK's evaluation of his performance, that disagreement alone does not render DAK's business decision illegitimate or untrue. *See, Beau v. Abbott Labs,* 130 F.3d 614, 620 (4th Cir. 1997) (courts leave to employer's discretion the method of evauating an employee's job performance); *see also, Smith v. Flax,* 618 F.2d 1062, 1067 (4th Cir. 1980) (stating that "it is the perception of the decision maker which is relevant," not the self assessment of the plaintiff).

Next, as far as the plaintiff's contention that two white employees were absent from work more than he was, he deposed that he did not know why they were absent, or whether those absences were protected by the Family and Medical Leave Act. (Minus Dep. at pp. 52-53). Moreover, he has never seen either employee's personnel file, *Id.* at 115-16, so he has no credible basis for comparing their 2001 Performance Evaluations to his. His claim fails since he has not forecast evidence that DAK's legitimate, nondiscriminatory reasons for his 2001 Performance Evaluation were a pretext for intentional discrimination. *See, e.g., Weeks v. Union Camp Corp.*, 215 F.3d 1323 (4th Cir. 2000) (affirming summary judgment for the employer on plaintiffs Title VII claim

where plaintiff failed to show that his conduct was comparable to other employees who were treated differently).

b. September 2002 CSR positions

In September 2002, DAK needed individuals to fill three CSR positions in North Carolina.

Plaintiff neither applied for the position nor informed anyone at DAK of his interest in the positions. (Warnock Aff. para. 24). After reviewing the resumes of the individuals who did express an interest in the CSR positions, DAK chose three individuals all of whom had significant past experience in customer service positions and who had assisting in CSR roles.

Plaintiff has no evidence whatsoever to support his claim that his non-selection for a CSR position was motivated by race or retaliation. First, DAK had no knowledge that plaintiff was even interested in a CSR position; Plaintiff neither applied for the position nor informed anyone at DAK of his interest. Absent such knowledge by DAK, plaintiff's failure to be selected cannot be the result of intentional discrimination.

Second, even if plaintiff had applied, he cannot show that he was better qualified than the candidates who were selected. *See, Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996) (noting that in discrimination claim based on failure to promote, plaintiff must establish that he was better qualified candidate for position sought). Plaintiff admitted that he knew nothing about the work history, experience or qualifications of the candidates selected. (Minus Dep. at p. 55). In light of DAK's uncontroverted evidence of the selectees' relative qualifications, plaintiff's claim fails as a matter of law.

c. July 2003 termination

DAK has presented evidence that the reason it terminated plaintiff's employment was because the plaintiff refused to sign and return company policies, despite ample time for review and questioning. Plaintiff was clearly apprised of and understood the consequences of his failure to sign the policies, and he was given numerous opportunities to ask questions, obtain information and reconsider his position. Moreover, he was aware that he was the sole employee at the plant who did not sign the policies when he was fired.

Here, it appears that DAK has demonstrated that its decisions regarding plaintiff's employment were based on legitimate, nondiscriminatory factors unrelated to race or retaliation and that the plaintiff has presented nothing but his wholly insufficient beliefs in rebuttal. There is no dispute that plaintiff refused to sign and return various company policies and that his employment was terminated because of that refusal. There is also no dispute that by the time Plaintiff was fired he was the only employee who did not sign and return the policies. Moreover, plaintiff was fully aware that signing and returning the policies was a condition of continued employment at DAK. Although plaintiff may disagree with this requirement, his disagreement alone, absent any suggestion of unequal treatment, does not render DAK's termination decision illegitimate or untrue.

CONCLUSION

Accordingly, for the aforementioned reasons, it appears there is no genuine issue of material fact sufficient to withstand summary judgment. Therefore it is recommended that the defendant's motion for summary judgment be granted, all other motions be deemed moot, and this matter ended.

Respectfully Submitted,

/s/ Robert S. Carr
Robert S. Carr
United States Magistrate Judge

Charleston, South Carolina

December 28, 2004